S.B.Cr.Appeal No.420/1984

The State of Rajasthan

Vs.

Harlal

DATE OF ORDER : - 03.03.2006

HON'BLE MR. R.C. GANDHI,J.

Mr. S.N.Tiwari, Public Prosecutor, for the State
Mr. K.R. Choudhary, for the respondent

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This criminal appeal has been preferred under Section 378 (1) Cr.P.C. against the judgment and order dated 7.3.1983 passed by learned Judicial Magistrate, Siwana in Cr. Case No. 121/1980 whereby he has acquitted the accused of the alleged commission of the charge under Section 9 of the Opium Act.

The prosecution story is that on 26.4.1977, the S.H.O., Police Station, Samdari, Tapaswi Lal alongwith two Constables, namely, Nawal Kishore and Moti Singh were on "Gast" duty. At about 9.00 p.m., they reached at Village Moja Majal. Two passengers belonging to Vishnoi community were suspected and one of them was called. On query, the said person told that he was going to Village Kotdi. He disclosed his name as Harlal and was carrying a packet in his hand. The

SHO asked him what is contained in this packet. He told that it is some material. In the meantime, Constable Moti Singh and another person reached there. Har Lal ran away alongwith packet. He was chased and caught by all these three persons. He was searched in the presence of Ram Singh, Ghishu Lal and Deva Ram and on search it was found that the packet contained opium which on measurement was found to be 1 kg. 600 grams. Out of the opium recovered, 35 grams of opium was taken out as sample and was sealed in a separate packet. The accused was found with one more piece of opium which was also sealed separately. The accused was arrested; Recovery memo was prepared; FIR was prepared and sent to police station, Samdari. On the basis of this, FIR was lodged and report was sent back to SHO. On spot, he started investigation. He collected the other evidence and presented challan.

During trial, the prosecution recorded statements of 10 witnesses under Sec. 161 Cr.P.C. Out of these prosecution witnesses to prove the guilt, the prosecution has produced PW-6 SHO Tapaswi Lal, Constables PW-1 Nawal Kishore, PW-2 Motbira Deva and PW-3 Rama, Constables PW-4 Pratap Singh, PW-5 Har Lal Singh and PW-7 Shankar Singh before the trial court. Ram Singh and Ghishu Lal, independent witnesses, have not been produced. The constable Moti Lal, who chased the accused and caught hold alongwith Nawal Kishore though cited as prosecution witness, was also not produced.

Learned trial Magistrate on appreciation of evidence found that the statements of witnessws are contradictory to the recovery memo. PWs Deva and Rama have been declared hostile, therefore, the recovery has not been proved. He also noticed contradictions in the statement of the SHO Tapaswi Lal and Constables Pratap Singh and Har Lal, prosecution witnesses. PW-4, PW-5 and PW-7 are witnesses for proving sample of opium. The trial Magistrate being not satisfied that the prosecution has proved the commission of offence, acquitted the accused.

The prosecution having not been satisfied with the order of the trial court, preferred this appeal on the ground that the learned trial court has not legally appreciated the evidence and has come to erroneous conclusion for acquittal though prosecution has proved the case against the accused.

Heard learned counsel for the parties and perused the record.

Learned counsel for the appellant has reiterated his submission as set-out in the memo of appeal contending that the learned trial magistrate has not appreciated evidence led by the prosecution correctly and acquittal of the accused is unjustified. It is admitted case

of the prosecution that the recovery memo has not been proved. Out out of three motbir independent witnesses, two viz. Ram Singh and Ghishu Lal have not been produced. The third witness PW-2 Deva has also not supported the prosecution story. Both the prosecution witnesses i.e. Dewa and Rama, who were examined to produce before the trial court to prove the recovery memo have been declared hostile.

On the spot, there were three persons i.e. SHO Tapaswi Lal, Nawal Kishore and Moti Singh. Constables Nawal Kishore and Moti Singh and one independent person chased the accused while running with the contraband item and caught hold of him. PW-Moti Singh was a necessary and important witness of the prosecution, but he has not been examined.

Besides, it is the case of the prosecution that the accused and the seized contraband was sent to the police station in the custody of Moti Singh and Nawal Kishore, Constables. Nawal Kishore in his statement has stated that Moti Singh was handed-over the seized material. PW-Pratap Singh, who was in police station, has stated in his statement that seized material was given to him by Constable Moti Singh. He has recorded the First Information Report and on that he and Moti Singh have put the signatures. The report was thereafter sent to the SHO on the spot. The on spot proceedings have been completed in the torch

light and with the help of the light of tractor. The owner of the tractor has not been cited as witness by the prosecution. PW-Pratap Singh has not stated in his statement that the accused was also taken into custody. He has also not stated that any sample of opium was handed over to him. From the statement of Pratap Singh, it appears that the accused and sealed material was not brought to the police station in his presence. He does not state whether contraband material was in possession of Moti Singh. In his cross-examination, he has stated that he does not remember as to whether the contraband material and accused was brought to Police Station alongwith him. Pratap Singh also stated in his cross-examination that Moti Singh alone came to him. He has denied that he has deposited the seized material in police station Samdari, whereas SHO Tapaswi Lal PW-6 has stated in his statement that contraband material was handed over to Pratap Singh being incharge of police station and on the next day when he came to the police station he took the said contraband material in his possession. There are significant contradictions in the statements of these witnesses. The other discrepancies which are noticed are that Constable Har Lal PW-5 has stated in his statement that there is Malkhana in police station Barmer and the material is to be kept in that police station. The sample of the contraband was taken by Constable Har Lal on 3.5.1977. He handed-over the said contraband article to Constable Shankar Singh on 6.5.1977. It has not been explained by the prosecution in whose

custody and in what circumstances the material was lying from 3.5.1977 to 6.5.1977.

Learned counsel for the respondent has relied upon the judgment delivered by a coordinate bench in case title The State of Rajasthan Vs. Prabhu & Another, reported in Cr. L.R.(Raj.) 1976 pg. 623 to convince the Court that if the recovery memo has not been proved, the other evidence cannot be discarded. Apart from the recovery memo, the other evidence is also not credible. The contradictions and contrary discrepancies noticed in the evidence of the prosecution make out the case of the prosecution seriously doubtful. The statement of the police personnel are also contradictory. Prosecution has not explained under what circumstances and in whose custody the contraband material was delivered to the Police Station, Barmer.

Learned counsel for the respondent has relied upon the judgment delivered in the case of Deva Vs. State of Rajasthan, reported in 1991 WLN (UC) Pg. 229 by a coordinate bench of this Court. In this case, the recovery memo was not proved. The court relying on the judgment delivered in Kasim Ali's case, observed as under :-

> "In the present case, two motbirs of the alleged recovery namely; Shambhulal and Dayaram, Shambhulal has turned hostile while Dayaram was not

> examined. In Kasim Ali's case (supra), the view has been taken that motbir witnesses have turned hostile therefore, the recovery cannot be held to be proved by the prosecution solely on the testimony of Investigating officer, the conviction is liable to be set aside.
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> Considering the view taken by their Lordships of the Supreme Court in Daulatram's case (supra) and the view taken by this Court in respect of the recovery, where the motbirs have turned hostile. In such circumstances, the conviction is not justified."

In this case also, recovery memo has not been proved. The witnesses cited by the prosecution to prove the recovery memo have been declared hostile.

In view of the aforesaid, the learned trial Magistrate has rightly recorded the findings of acquittal as the prosecution has failed to prove the case against the accused-respondent. This appeal being devoid of merit is dismissed.

(R.C.GANDHI), J.

RM/-